IN THE

Supreme Court of the United States.

WILLIAM M. BARRETT, as President of the Adams Express Company,

Petitioner,

—against—

ARTHUR H. VAN PELT,

Respondent.

PETITIONER'S REPLY BRIEF.

Since the respondent has not attempted to answer Point III of the petitioner's brief, we must assume that he has conceded that the defendant could not waive the requirement for filing a claim within four months from the time of delivery, if such requirement was lawfully inserted in the Uniform Express Receipt.

Furthermore, the respondent practically admits that if construed according to its punctuation the proviso of the First Cummins Amendment in question must have the interpretation contended for by the petitioner.

Much of the respondent's brief consists of comments on excerpts taken from our main brief and our brief in support of the application for a writ of certiorari, apparently without regard to the context of the brief from which such excerpts were taken. We do not believe that this is quite fair or that the respondent has fully apprehended our point in the case of the excerpts quoted by

him and, without other comment on the respondent's obvious purpose in criticising our brief, rather than devoting himself to the proper construction of the law, we shall confine ourselves to a discussion of the points of law involved.

Respondent's Point III.

Taking up the discussion of respondent's points in inverse order, in his Point III he argues that "upon a showing of unreasonable delay, the burden is on the carrier to show a legal excuse for such delay, if he has one." Thereupon the respondent sets out a detailed statement of the facts in this case (from his point of view), apparently for the purpose of showing the aggravated nature of the delay in this case. While we made no point in our main brief on the question of the sufficiency of the evidence in this case, deeming this Court primarily interested in the Federal question, we cannot let the respondent's statement of the facts pass unchallenged.

In our opinion there was no evidence before the Court of an unreasonable delay. The only testimony upon this point is that of the respondent's attorney, to the effect that he had travelled by passenger train between New York and Louisville, Kentucky, in twenty-five or twenty-six hours (Record, p. 69). There was no attempt to show the time usually made by trains upon which carloads of eggs moving by express were or could be transported, and not even any testimony to show the usual time for a passenger to make the trip in February, 1918.

The movement in question was in February,

1918, during which period this country was in a state of war, and it is a matter of public knowledge, of which this Court will take judicial cognizance, that the conditions of public transportation were not the same as in normal times. The Government had only sixty days prior to the date of this shipment taken possession and control of all railroad transportation under proclamation of the President. An unreasonable delay is one which takes into consideration all of the existing conditions, especially those beyond the control of the carrier, and we submit that the respondent conspicuously failed to show an unreasonable delay.

However, the respondent fails to answer our contention that, even if there is proof of delay beyond a reasonable time, which would make a carrier liable in the absence of a defense based on a contractual requirement for the filing of a claim, the mere proof of such delay will not bring the claimant within an exception to the contractual requirement, limited to cases of delay due to the negligence or carelessness of the carrier. Our contention is that in order to avail himself of the benefit of the statutory exception, so limited, the claimant has a burden of proof to sustain which would be unnecessary in cases where he had filed a claim or where there were no such contractual requirements. If the plaintiff has filed his claim he need only prove a delay beyond a reasonable time for delivery in order to create a presumption of negligence on the part of the carrier, but if he has not filed a claim and seeks to avail himself of an exception to such requirement, he cannot avail himself of the presumption of negligence but must affirmatively prove the facts which bring his claim within the excepted class.

Respondent's Point II.

Respondent in his Point II cites one of the reasons given by petitioner in his application for a writ of certiorari, why this Court should grant the writ, *i. e.*, conflict of judicial opinion as to the proper interpretation of the First Cummins Amendment, and attempts to show by certain cited cases that no such conflict exists.

This amounts to an argument that the writ of certiorari issued by this Court should not have been granted. Since the writ *was* granted and the case is now up for argument upon its merits, it seems unnecessary to further discuss this point.

It is noteworthy that in the excerpt from *Gillette Safety Razor Co.* v. *Davis*, 278 Fed. 864, cited by the respondent as setting forth precisely his contention, the Circuit Court of Appeals for the First Circuit found itself obliged to take considerable liberties with the language of the Cummins Amendment. Its interpretation of the proviso in question, with its interpolations marked by parentheses, was as follows:

> "That if the loss, damage, or injury complained of was due to delay (in the delivery of such property) or (it was) damage (d) while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim, nor filing of claim, shall be required as a condition precedent to recover."

However, we believe that the learned Court was rather fitting the hand to the glove in working out such a rendering of the statute. If any in-

terpolation at all is necessary to make it grammatically intelligent, we believe that by merely inserting the obviously missing subject of the phrase "while being loaded or unloaded" the statute is made clear without the necessity of reading into it language which is not warranted by the bare wording of the act itself.

> "Provided, however, that if the loss, damage or injury complained of was due to delay or damage while (the shipment was) being loaded or unloaded, or (the shipment was) damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Respondent's Point I.

Coming to his principal (we might say only) point, respondent claims the construction placed on the first Cummins Amendment by the Court below is correct because it is inconvenient or impossible for the ordinary shipper to prove where the delay occurred or that it was due to the negligence of the carrier.

The main argument adduced by the respondent is that under the common law of New York the mere proof of delay in delivery beyond a usual and reasonable time was sufficient to create a presumption of negligence, and that the shipper should not have the burden of proving that the delay was due to negligence or that it occurred while the property was being loaded or unloaded.

In the latter case he claims that it is practically impossible for a shipper to ascertain and prove whether or not the delay of which he is complain-

ing came about in loading or unloading the shipment. This is true in the case of shipments of inanimate freight, but the respondent fails to take into consideration the historical fact that this Amendment was drawn by and adopted at the instance of shippers of *live stock*. The circumstances surrounding the shipment of live stock were at the time of the adoption of the Cummins Amendment, and still are, substantially different from those connected with the movement of inanimate freight.

Shipments of live stock were brought by the shipper to the loading pens of the railroad company and there held at the shipper's risk until the carrier provided and set at the pens the empty cars for their transportation. They were loaded into the cars by the shipper who then executed a live stock shipping contract and usually *sent his own attendants on the train in charge of the live stock*. The law forbade the transportation of live stock for a greater period than twenty-eight hours and the attendant in charge might require the carrier to place the cars at feeding stations to be unloaded for water, feed and rest. The live stock transportation contracts generally required claim to be filed in a very short period, five days being a not uncommon limit.

Thus we see that in the case of the live stock shippers, for whose benefit the Cummins Amendment was adopted, claims for delay while the shipment was being loaded or unloaded constituted an important classification and proof that the delay occurred at such time was a simple matter.

The respondent's contention that it is an injus-

tice and hardship to compel the shipper to affirmatively establish the negligence of the carrier or the point when the delay occurred is specious. In cases where he has promptly filed a claim there is no such burden thrown on the shipper. The rule requiring reasonable notice and filing of claims is eminently fair alike to shipper and carrier. It is only where the shipper has not done this that he must attempt to take advantage of the exception contained in the Cummins Amendment. If he is able to bring his claim within the terms of the exception he secures an inequitable and unjust advantage over the carrier because he is allowed to prosecute a claim of which the carrier has had no notice and which it has not been able to investigate. Such being the case, how can the respondent be heard to complain if it is inconvenient or difficult for him to prove the facts which bring his case within the exceptions contained in the Cummins Amendment? In the first place, he is attempting to get the benefit of an exception put in for the benefit of another kind of shipper, and in the second place, he is attempting to bring himself within an exception that gives him an unjust advantage over the carrier.

The respondent quotes an excerpt from a New York decision in which the learned Court states that in case of claims for delay resulting in loss of market value, there is no necessity for requiring prompt notice of claims. The invalidity of this statement is strikingly evidenced by the respondent's own admission (respondent's brief, p. 7), that a carrier is not an insurer against delay and claims for damages due to delay are predicated on *negligence*. In other words, if the car-

rier can show reasonable diligence in transporting the shipment, it is absolved from liability. In order to make the investigation which will establish the facts as to its diligence or lack of diligence in transporting the shipment the carrier must act promptly, while the transaction is still fresh in the recollection of its employees and its records are intact. In fact in the case of claims for loss of market value due to delay, where there is no physical damage, there is a peculiar need for prompt notice of claim. In cases of actual physical damage due to delay, it may be claimed that the carrier should take notice from the damaged condition of the shipment at the time of delivery that a claim is in prospect and that an investigation should be made. However, in delivering a shipment which is not physically damaged the carrier can not be charged with knowledge of a drop in market value during transit and unless claim is promptly made by the shipper it cannot prepare itself to defend or adjust the claim.

Respectfully submitted,

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OCTOBER TERM, 1924.
No. 160.

ILLIAM M. BARRETT, AS PRESIDENT OF THE ADAMS EXPRESS COMPANY, INC.,

Petitioner,

vs.

ARTHUR H. VAN PELT,

Respondent.

CERTIORARI TO REVIEW A JUDGMENT OF THE SUPREME COURT, NEW YORK STATE, APPELLATE DIVISION, FIRST DEPARTMENT.

BRIEF FILED BY LEAVE OF COURT IN BEHALF OF AMERICAN RAILWAY EXPRESS COMPANY.

H. S. MARX,
A. M. HARTUNG,
Amici Curiae.

...Post Job Printing Office, Inc., 104 Fulton St., New York, N. Y.

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Statement.

The American Railway Express Company is a Delaware Corporation engaged in the interstate transportation of property by express throughout the United States, handling approximately 750,000 shipments per day. The claims for loss, damage, or delay to the shipments transported by it, average 500,000 per year, and the amount paid by it in satisfaction of such claims, averages in excess of $3,500,000 per year. A very large percentage of the shipments handled by it are made for the purpose of reaching early markets, and are peculiarly subject to claims for decline in market value growing out of delay in transit, and the Company, there-

fore, is directly interested, and will be materially affected by the determination of the question involved in this case, namely, whether claims *solely for decline in the market price* of commodities, *and not for physical damage* to the goods, growing out of alleged negligent delay in transportation, need not be filed within four months after the delivery of the property, under the following provision of the Uniform Express Receipt:

> "Except where the loss, damage or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; * * *"

This provision is drawn in accordance with a proviso in the so-called First Cummins Amendment to Section 20 of the Interstate Commerce Act (38 Stat. 1196-1197, Chap. 176, amending 24 Stat. 386, Section 20, as amended by 34 Stat. 593, 595, Section 7) reading as follows:

> "Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.*" (Italics ours.)

ARGUMENT.

POINT I.

Plaintiff's claim, being for monetary damages represented by a decline in the market value of goods resulting from alleged unreasonable delay in transportation, and not in physical damage to such goods, comes within the requirements of the claim provision of the Uniform Express Receipt.

The proviso in the First Cummins Amendment makes it unlawful to require the filing of claims within less than four months, and provides further:

> "That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

Accordingly, the Uniform Express Receipt provides:

> "Except where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; * * *"

We interpret the provision in the Uniform Express Receipt to provide that claims in writing

are required to be filed within the specified time, except claims for loss, damage or injury due to:

(1) delay or damage while being loaded or unloaded,

(2) damaged in transit by carelessness or negligence.

A claim for delay resulting in *physical damage* to a shipment, caused by negligence, comes within the exception, "(2) damaged in transit by carelessness or negligence", and need not be filed within the time specified in the claim provision of the Uniform Express Receipt. "Damaged in transit" clearly contemplates *physical* damage to the property shipped; the phrase is not susceptible of any other construction. But a claim for damages *measured by the decline in the market price of goods* (and not for physical damage) due to alleged unreasonable delay in transit obviously is not due to "(2) damaged in transit by carelessness or negligence". The occasion for this distinction is readily apparent; physical damage to the shipment comes immediately to the notice of the carrier, no filing of claim is necessary; but the carrier has no knowledge at point of delivery of the time consumed in transportation nor whether there was any negligent delay in transit and no occasion for inquiry as to market prices. Hence the filing of claim for physical damage may justifiably be dispensed with, but the same considerations do not apply to claims solely for decline in market prices, due to alleged delay in transit.

The claim here in question is such a claim; there is no question of physical damage to the shipment; it is purely and simply a claim for a drop in the market price between the time when the shipment

should have been delivered in due course of transportation and the time when it was actually delivered; and under the provision of the Uniform Express Receipt must be made in writing within four months after delivery of the property.

The interpretation of the claim provision to provide that all claims are required to be filed within a specified time, except claims for loss, damage or ~~delay~~ INJURY due to: (1) delay or damage while being loaded or unloaded, or (2) damaged in transit by carelessness or negligence is based on a literal application of the language, with due regard to the punctuation employed; it is in accord with the rules of legal construction applying to the interpretation of exceptions and provisos; and is supported by the circumstances surrounding the adoption of the so-called First Cummins Amendment, as is clearly and forcibly demonstrated by the Brief of the Petitioner herein (pp. 6-17).

The apparent difficulty of the courts in the application of the clause grows out of their failure to consider the circumstances surrounding the enactment of the legislation, and of the purpose the Congress sought to accomplish. An examination of the records in the Senate, and in the House of Representatives, clearly discloses that the proviso was inserted at the request, and for the benefit of the live stock shippers (Petitioner's Brief, pp. 11 to 17). Live stock is peculiarly subject to delay and damage in loading at point of origin, in unloading at destination, and in loading or unloading at intermediate points which is frequently necessary to comply with the provisions of the Federal Twenty-Eight Hour Law (Act June 26th, 1906, Chapter 3594, Section 1, 34 Stat. 607), and to damage in

transit by negligence of the carrier. Applied as intended to live stock claims, the interpretation of the clause affords no difficulties. Applied to live stock claims it is clear, definite and logical, and wholly accomplishes the purpose intended when interpreted literally, and with due regard to the punctuation.

Owing largely to the lack of consideration of these circumstances, and to attempts to interpret the statute by changing its language and punctuation, the decisions of the Courts are not harmonious as to the meaning and effect of the proviso; some of them being in accord with the interpretation we contend for and others not.

The American Railway Express Company—in whose behalf this brief is filed—is engaged in the interstate transportation of property by express throughout the United States; it is directly and vitally interested in a correct and uniform interpretation of the provision for its guidance and protection in the handling of its claims; and we think it important and desirable to review and analyze the decisions to establish the correctness of the interpretation contended for, and the error of the State Court in this case, and of other courts in other cases, in adopting other interpretations.

The proviso was interpreted, as we interpret it, by the Supreme Court, Appellate Term, First Department of the State of New York, in Lissberger v. Bush Terminal Railroad Co., 197 N. Y. Supp. 281 (119 Misc. 691) (a court of inferior jurisdiction and not the highest court of the State). That action was brought to recover damages for delay in transit in the transportation of a carload of scrap

brass, shipped from Chicago, Ill., to New York City. The defendant pleaded the failure to file a claim within four months after the delivery of the property, as prescribed by the bill of lading in a provision identical with the one involved in this case. In holding that the claim was barred by this provision, the Court said at page 283:

> "* * * The contention of the plaintiffs that their claim comes within the excepted cases specified in the bill of lading so that they were not required to file any claim, is not well founded. An examination of the language of the bill, quoted above, shows clearly that the only cases in which notice is not required are (1) where the loss, damage or injury is due to delay or damage while being *loaded or unloaded;* and (2) where the shipment is '*damaged* in transit by carelessness or negligence.'"
>
> "The instant case does not fall within either of the two excepted cases. The plaintiffs did their own unloading, and no claim arises under the first class of cases. The second class of excepted cases, in which no notice is required to be filed, is clearly confined solely to claims for 'injury' to a shipment 'damaged in transit by carelessness or negligence' of the carrier."
>
> "In the instant case the claim is not one for damage in transit, but for delay in transit, and, therefore a claim must be filed within the prescribed time of four months after delivery, even though the delay may have been due to negligence."

Apparently it was likewise so construed by the Supreme Court of Georgia in Southern Railway Company *v.* Bunch, 109 Southeastern, 523.

The proviso has been similarly construed by the

Courts of numerous States in cases involving an entire or partial loss of shipments in transit.

Kahn *v.* Am. Ry. Express Co., 106 S. E. 126 (W. Va.);

St. Sing *v.* Am. Ry. Exp. Co., 111 S. E. 710 (N. C.);

Conover *v.* B. & O. S. W. Ry., 212 Ill. App. 29 (Ill.);

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Hilbert *v.* Pa. R. Co., 120 Atl. Rep. 778 (Pa.);

Allen *v.* Davis, Director General of Railroads, 118 S. E. 614 (S. C.).

In St. Sing *v.* Am. Ry. Exp. Co., *supra*, it was held that a claim for absolute loss of goods in breach of the contract of carriage, presents a typical instance calling for the application of the contract stipulation, and does not come within the purpose or meaning of the proviso.

In Conover *v.* Baltimore & Ohio S. W. Ry., 212 Ill. App. 29, it was said:

> "Loss of grain from a car cannot reasonably be included in the exemption of 'loss, damage or injury * * * due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence'. It is necessary to prove that a claim in writing was made to the carrier, either at the point of delivery or at the point of origin of the shipment, within 4 months."

In Henningsen Produce Co. *v.* American Railway Express Co., 188 N. W. (Minn.) 272, which was a

suit against a carrier for the loss of a trunk, the Court said:

> "It (the plaintiff) now contends that it was not necessary to make a claim as a condition of recovery. Its argument is that the merchandise was lost in transit, and by negligence, and therefore the limitation does not apply. We are unable to take this view. The language of the Statute is plain. *Even when the merchandise is lost in transit by negligence the Cummins Amendment does not dispense with making a claim.*"

In Cunningham *vs.* Missouri Pacific R. R. Co., *supra,* a suit for partial failure to deliver cattle, and for bruising, injuring, and damaging the head of cattle delivered, the Court held the provision of the bill of lading for the filing of claim to be valid and with particular reference to the construction of the proviso stated at page 1005:

> "We find no case construing or applying this proviso. It cannot, however, be applied here, for the reason that plaintiff does not base his claim on delay or damage while his stock was being loaded or unloaded or on damage in transit by carelessness or negligence * * *"

In Hilbert *vs.* Pennsylvania R. R. Co., *supra,* a suit to recover the value of goods which the railroad company had failed to deliver to the consignee as required by the bill of lading, and after the goods were located the railroad company still refused to deliver the goods, the Court said with reference to the notice of claim provision at page 779:

> "Furthermore, the plaintiff here made no claim in writing against the carrier until nearly two years and six months after the date of shipment, and as the loss, damage, or injury complained of was not due to delay or damage

> while being loaded or unloaded, or damaged in transit by carelessness or negligence, her right of action was lost by failure to make such written claim within six months after a reasonable time for delivery, as the provision in the bill of lading to that effect is obligatory. (Citing cases.)"

The Appellate Division of the Supreme Court of the State of New York, for the First Department, whose decision is under attack here, construed the proviso included in the First Cummins Amendment to Section 20 of the Interstate Commerce Act, to prohibit a common carrier engaged in interstate commerce from requiring the filing of a claim within four months after the delivery of the shipment, for *monetary* damages growing out of alleged delay in the transportation of goods resulting in a decline in the market price and *not in physical damage to such goods*, and to prohibit a requirement in the express receipt for the filing of a claim, in such instances, on the ground that the so-called First Cummins Amendment made a double classification of claims, to wit: transit and non-transit claims, and forbade the carrier to require the filing of a so-called transit claim as a condition precedent to recovery; and permitted the carrier to require the filing of claims within a specified time only as to non-transit claims.

The error of the State Court in concluding that the proviso creates this double classification of claims, those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which it calls transit claims; and those for loss otherwise sustained, which it calls non-transit claims, apparently grew out of its failure literally to construe the proviso, its disregard of the punctuation, its lack of knowledge or of consideration of

the purpose Congress sought to accomplish by the statute, and the incorrect assumption that the claim provision in the Uniform Express Receipt was drawn by the carrier in derogation of the plaintiff's rights, in that respect falling into the same error as did the Court in Bell *v.* New York Cent. R. Co., 175 N. Y. Supp. 712, 714, the decision it relied upon as a precedent for the decision in this case.

Bell *v.* New York Cent. R. Co., *supra,* is clearly distinguishable and is not an authority for the decision in this case. In the Bell case, suit was brought to recover $286.20 damages to a shipment of pears which were unreasonably delayed in transit, *the car not properly placed for delivery, and several of the barrels and baskets containing the pears broken open and the contents crushed and bruised.* The defense in that case was that the suit was barred because not brought within two years, *and the Court held that defense to be valid.* The so-called "classification of claims" by the Court in its opinion into "transit" and "non-transit" claims may have been convenient for the purpose of the question there presented, but that case did not directly present the question of the meaning and effect of the proviso here under consideration, and the language of the court with reference thereto was purely *obiter dictum.*

The basis for its classification of transit and non-transit claims was not given and we can find none. The Court treated the provision, however, as one drawn by the carrier and used in derogation of the plaintiff's rights, and in this, it was in error for as we have shown the provision in the Uniform Express Receipt follows the language of the Statute (Act of March 4th, 1915, 38 Stat. 1196, Section 1), and the provision bears the specific approval of the

Interstate Commerce Commission in its order prescribing the form of the Uniform Express Receipt (Supplemental Order No. 18 of the Interstate Commerce Commission, April 2nd, 1917, Docket No. 4198, In the Matter of Express Rates, Practices, Accounts and Revenues, See 43 I. C. C. 510). The Cummins Amendment is in derogation of the common law and must be strictly construed (see pp. 6-8 of petitioner's brief); the provision in the Express Receipt was a part of a filed tariff, and had the force and effect of a statute; it could not be waived by the carrier; and the burden was upon the shipper to bring himself within the excepted cases for which no filing of claim was required (see pp. 26-31, Petitioner's Brief).

An analysis of the decisions of the Courts in a few other cases in which the proviso has been construed otherwise than as we have interpreted it, discloses that such constructions grow out of a failure similar to that of the Court in Bell *v.* New York Cent. R. Co., *supra,* literally to construe the Statute as punctuated, and that in nearly every instance the punctuation has been changed and/or letters or words added and/or omitted in an effort to make such construction more reasonable and in accord with the purpose Congress *may have had in mind,* and without reference to, or consideration of the proceedings in Congress, or of the origin or purpose of the legislation.

Thus in Hailey *v.* Oregon Short Line Ry., 253 Fed. Rep. 569, a decision by the Federal District Court in Idaho, heard on a demurrer to a special plea of the defendant setting up the defense that no claim was filed, the declaration alleged that animals shipped were damaged as the result of being "unnecessarily and carelessly held at Green River,

Wyo., for eight days, in the yards of the railroad company, without proper shelter and care, or proper facilities therefor", and "as a consequence of such delay and carelessness" the damage occurred. In other words, the facts admitted by the pleadings were that the animals were "delayed" and "damaged in transit by carelessness and negligence", bringing the case squarely within the words of the proviso, and the District Judge so held, stating at page 571 (whatever else the District Judge said about the Amendment was purely *obiter dicta*).

> "The damages claimed were not the result of delay or injury in loading or unloading the horses; they were *damaged 'in transit'*, as that phrase is ordinarily understood, and by the *carelessness and negligence* of the carrier, *if the averments of the complaint are true. The phrase 'carelessness and negligence' undoubtedly qualifies* 'damaged in transit'."

That was the point of the decision. It was unnecessary for the Court to go further, but he proceeds:

> "In the case of a claim for damages suffered in the loading or unloading of a shipment, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in some particulars the grammatical construction is manifestly defective, and, that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in other respects the structure were artistic, perhaps a different view should be taken; but under the circumstances it is thought we are warranted in entirely ignoring the comma after 'unloaded' or inserting it after 'transit'. In this view the proviso in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negli-

> gence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in there unloading it."

To give effect to this strained construction, it was necessary for the Court to ignore the comma after the word "unloaded" and insert it after "transit", which we submit is erroneous.

Upon proper analysis it is apparent that "negligence" is not the key word of the whole proviso; that negligence is material only where property is damaged in transit. If Congress had intended that carelessness or negligence of the carrier should excuse the filing of all claims for loss, damage or delay, it would have shortened and simplified the proviso to read:

> "Provided, however, that if the loss, damage or injury complained of was due to negligence, then no notice of claim, nor filing of claim shall be required as a condition precedent to recovery."

Congress did not so draw the statute. It specified certain exceptions to meet certain conditions it had in mind and it is not for the courts to extend the application of the statute.

So, too, in the case of Gillette Safety Razor Co. *v.* Davis, Director General, 278 Fed. 864. This was a suit for failure to deliver merchandise shipped from Boston to New York under the Uniform Express Receipt. Claim was not filed within four months after a reasonable time for delivery had elapsed, and it was held that plaintiff was not entitled to maintain the suit for that reason.

With reference to the contention that the loss or damage occurred while the merchandise was being unloaded and that, if so, under the terms of Section 7 of the Uniform Express Receipt and the proviso

of the First-Cummins Amendment, the plaintiff was entitled to recover in contract, without showing that the unloading was carelessly or negligently done and without proof of notice the Court said:

> "Reading the second above quoted proviso in connection with the language contained in the preceding provisions of the act, it is apparent that its true reading is:
>
> " 'That if the loss, damage or injury complained of was due to delay (in the delivery of such property) or (it was) damage(d) while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.'
>
> "Thus read it is clear that Congress intended by the language of the act that the carrier should be responsible for loss occasioned the consignee by the carrier's negligent delay, negligence in loading or unloading, and negligence in transit."

To effect such construction the Court found it necessary to interpolate after the word delay "(in the delivery of such property)," before the word damage "(it was)" add the letter (d) to the word "damage" and entirely to ignore the punctuation rather than to accept the language as it stood and to construe it as Congress had enacted the proviso and with due regard to the purpose it sought to accomplish. The carrier, however, was not in a position to attack that construction by the Court in that case since the decision was in its favor; the Court finding that the carrier was liable only in the case of negligence and that the circumstances did not authorize an inference of fault on the part of the defendant, and the plaintiff having

failed to introduce evidence from which such inference could be drawn the Court below did not err in holding that the defendant was without fault and affirmed a judgment of a lower court in favor of the defendant. The plaintiffs in that case applied to this Court for a writ of certiorari which was denied; 259 U. S. 587. The same Court subsequently adopted the same construction of the proviso in the case of American Express Company, Plaintiff in Error, *v.* Farmington Shoe Manufacturing Company, Defendant in Error, and an appeal has been taken by writ of error to this Court where it is now pending as No. 507, October Term, 1924.

Such constructions of the proviso fail to give force and effect to the proviso itself, and as we have urged, grow out of the addition or interpolation of words or letters not contained in the statute, and the alteration of the punctuation, or the denial of any consideration to such punctuation. We earnestly submit that the proviso as enacted:

> "Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

is clear and definite in prescribing that except as to claims for loss, damage or injury due to (1) delay or damage while being loaded or unloaded, and (2) damaged in transit by carelessness or negligence, the filing of claims within a specified time may be required; that claims for monetary damages growing out of alleged delay in transportation resulting solely in a decline in the market price of the ship-

ment, do not come within the excepted classes, and no claim having been filed within the time required by the provision of the Uniform Express Receipt, the claim is outlawed and judgment should be rendered in favor of the carrier.

Respectfully submitted,

H. S. MARX,
A. M. HARTUNG,
Amici Curiæ.

New York, N. Y., December 30th, 1924.

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Supreme Court of the United States

IN THE MATTER

of

The Petition of WILLIAM M. BARRETT, as President of the Adams Express Company,

Petitioner,

against

ARTHUR H. VAN PELT,

Respondent,

for a writ of certiorari to the Appellate Division of the Supreme Court of the State of New York for the First Department, to bring before the Supreme Court the case of Arthur H. Van Pelt,

Plaintiff-Respondent,

against

WILLIAM M. BARRETT,
as President of the Adams Express Company,

Defendant-Appellant.

BRIEF IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

Statement of Facts.

This is a petition by the defendant-appellant for a writ of certiorari directed to the Appellate Division of the Supreme Court of the State of New

York for the First Department, to review the decision of that Court affirming a judgment in favor of the plaintiff for the sum of $3,545.65 for damages due to delay in the shipment of a car of eggs, a perishable food product. The car of eggs was delivered to defendant at Louisville, Ky., on February 23rd, 1918, and was not delivered to the consignee in the City of New York until March 4th, 1918.

The sole defense relied upon by the defendant upon which evidence was offered on the trial was that no claim had been filed with the defendant within four months after the delivery of the car of eggs to the consignee.

The judgment of the Trial Court was unanimously affirmed by the Appellate Division of the Supreme Court of the State of New York for the First Department in 205 N. Y. App. Div., 332, 335. Subsequently, the defendant made a motion in the Appellate Division for reargument, or for leave to appeal to the Court of Appeals of the State of New York, which was denied, and thereafter made a motion in the Court of Appeals for permission to appeal to that Court from the Appellate Division, which motion was also denied.

POINT I.

There is no conflict of judicial opinion as to the proper interpretation of the First Cummins Amendment to the Interstate Commerce Act.

The First Cummins Amendment was construed by the United States Circuit Court of Appeals, First Circuit, in *Gillette Safety Razor Co.* v. *Davis*, 278 Fed., 864 (application for writ of certiorari

denied by this Court June 5th, 1922); by the United States District Court for the Southern District of Idaho in *Hailey* v. *Oregon Short Line R. R. Co.*, 253 Fed., 569; by the highest court of the State of Missouri in *Hunt* v. *Hines*, 223 S. W., 798; by the Illinois Appellate Court for the Third District in *Conover* v. *Wabash R. R. Co.*, 208 Ill., 105, and in *Conover* v. *B. & O. S. W. R. R. Co.*, 212 Ill., 29, at pages 32 and 36; and, in addition to the present case, by the Appellate Division of the Supreme Court of the State of New York for the First Department in *Bell* v. *New York Central R. R.*, 187 N. Y. App. Div., 564, 566.

These cases are all in accord as to the proper construction of the First Cummins Amendment.

In *Gillette Safety Razor Co.* v. *Davis, supra*, the transaction out of which the suit arose took place between the plaintiff and the American Railway Express Co., when the latter was under Federal control. The District Court had found that the case, for the loss of which the action had been brought, had been received by the defendant for transportation from Boston to New York; that the goods reached the defendant's receiving platform in New York, from which they would, in the ordinary course of business, have been loaded on trucks for delivery to the consignee, but that they had been stolen from the platform before being placed upon the trucks; that at the time of the theft the goods were not being loaded or unloaded and that the theft was not due to negligence on the part of the defendant. The Circuit Court of Appeals in its opinion, among other things, said:

> "In the argument of the cause the plaintiff took two positions: (1) That the loss or damage occurred while the merchandise was be-

ing unloaded, and that, if so, under the terms of section 7 of the bill of lading and the proviso of the Act of March 4, 1915, the plaintiff was entitled to recover in contract without showing that the unloading was carelessly or negligently done and without proof of notice; and (2) that it is entitled to recover on the counts in tort for negligence, though no notice was given, it appearing that the defendant had received the goods for transportation and had failed to deliver them; that failure to deliver was not only presumptive evidence of negligence, but, in view of the state of the evidence, was conclusive proof of it.

"(1) The provisos of the Act of March 4, 1915, authorizing the provisions of section 7 of the bill of lading, read as follows:

> "'Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.' Comp. St. Sec. 8604 a.

"In the provisions of the act preceding the proviso a carrier, on receiving property for interstate transportation, is required to issue a receipt or bill of lading therefore and is made —"'liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier "'* * * to which such property may be delivered,' etc.

"Reading the second above quoted proviso in connection with the language contained in the preceding provisions of the act, it is apparent that its true reading is:

" 'That if the loss, damage or injury com-
"plained of was due to delay (in the delivery
"of such property) or (it was) damage(d)
"while being loaded or unloaded or dam-
"aged in transit by carelessness or negli-
"gence, then no notice of claim nor filing of
"claim shall be required as a condition pre-
"cedent to recovery.'

"Thus read it is clear that Congress intended by the language of the act that the carrier should be responsible for loss occasioned the consignee by the carrier's negligent delay, negligence in loading or unloading, and negligence in transit. In other words the liability imposed, where the required notice is not given, is for negligence, and as to these matters it differs in no material respect from the liability of a warehouseman, who is liable for negligence only."

In *Hailey* v. *Oregon Short Line R. R., supra,* the Court held that the comma after the word "unloaded" should be ignored or inserted after the word "transit," and that the shipper was relieved from giving notice of filing claims for damages which resulted from the carrier's negligence either in loading the shipment at the point of origin or in carrying out to the point of destination, or in their unloading it. The opinion of the Court so far as pertinent to the present case was as follows:

"I am inclined to the view that the basis of classification intended by Congress must be found in the phrase 'carelessness or negligence.' It is used in no other place in the entire section, and in the absence of some

ground for classification it appears to be not improbable that the legislative mind made a distinction between liabilities resulting from the carriers' negligence and those which rest upon a different basis, and accordingly declare that the carrier should not require notice of claims for damages arising out of its own negligence. While, for reasons which it is unnecessary to explain, we may be unable to assent to the wisdom or justice of denying to the carrier this right, such seems to be the intent of the proviso. So far as the facts in this case are concerned, the construction involves no lexical or grammatical difficulties. The damages claimed were not the result of delay or injury in loading or unloading the horses; they were damages 'in transit,' as that phrase is ordinarily understood, and by the carelessness and negligence of the carrier, if the averments of the complaint are true. The phrase 'carelessness and negligence' undoubtedly qualifies 'damaged in transit.'

"In the case of a claim for damages suffered in the loading or unloading of a shipment, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in some particulars the grammatical construction is manifestly defective, and, that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in other respects the construction were artistic, perhaps a different view should be taken, but under the circumstances it is thought that we are warranted in entirely ignoring the comma after 'unloaded' or inserting it after 'transit.' In this view the proviso in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negligence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in there unloading it."

In *Bell* v. *New York Central Railroad Company, supra,* the suit was to recover damages to a shipment of pears over the line of the defendant's railroad where the pears had been unreasonably delayed in transit and several of the barrels and baskets containing the pears, broken open and the contents crushed and bruised. The Court was called upon to construe a bill of lading promulgated pursuant to the First Cummins Amendment, and in construing the amendment, the Court in its opinion, said:

> "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to wit, (1) those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and (2) those for loss otherwise sustained, which we will call non-transit claims. The Cummings Amendment permitted the carrier to require as a condition precedent to recovery the filing of a non-transit claim within four months, and in such cases to require suit to be instituted within two years. In the case of transit claims, it forbade the carrier to require the filing of a claim as a condition precedent to recover, but authorized a requirement that suit be instituted within two years,"
>
> * * * * * * *
>
> "It is obvious that the claim in suit is within the class which we have called for brevity the transit cases, and that, therefore, it is one for a loss, of which notice *is not required and for which a claim does not have to be filed in writing. Indeed, in such a case, a requirement for either notice of loss or filing a written claim would be illegal under the Cummins Amendment*" (pp. 566, 567). (Italics ours.)

In *Conover* v. *Wabash Railroad Co. supra,* the Court said:

> "It does not appear that the Cummins Amendment has been before the Courts of Appeal for construction; at least no authority is cited, and we have not been able to find any construing it, but the appellee is entitled to sue for and recover the damages caused by the delay and negligence of the appellant in transit without giving any notice of filing any claim as a condition precedent to recover for such damages."

The decisions in *Conover* v. *B. & O. S. W. R. R.* and *Hunt* v. *Hines, supra,* are to the same effect.

The petitioner cites as holding contrary to these decisions, the case of *Lissberger* v. *Bush Terminal,* 197 N. Y. Supp., 281, and the case of *Southern Railway* v. *Bunch,* 109 S. E. 523. As to this latter case, the petitioner states in his brief (p. 17), that the Court did not hand down any opinion with its decision. How can it be said, therefore, that this case is in conflict with the cases holding that the requirment of a notice of claim for delay is prohibited when it does not appear that the Cummins Amendment was before the Court for construction?

As to the case of *Lissberger* v. *Bush Terminal, supra,* that case was decided by the Appellate Term of the Supreme Court for the First Department of the State of New York, a court inferior to the Appellate Division. Its decision, in so far as it held that it was necessary to file a notice where the claim was for delay, was in conflict with the decision of the Appellate Division in *Bell* v. *New York Central R. R. Co., supra,* and at any rate was overruled by the decision of the Appellate Division in this case.

The provision of the first amendment to the Interstate Commerce Law, here under consideration, was amended by the Act of February 28th, 1920, C. 91, 41 U. S. Stat., 490, and as amended reads as follows:

> "Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise, a shorter period for giving notice of claims than ninety days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years, *such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice;* provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery." (The italicized matter is the new matter added by the amendment to this provision.)

The petitioner in his brief (p. 16) says that

> "The present case is especially important in view of the fact that the Interstate Commerce Commission has now required the carriers to adopt a provision that 'suits for loss, damage or delay shall be instituted only within two years and one day after the date when the notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof.' "

This is the first time this claim has been made. In his brief submitted on the motion for leave to appeal to the Court of Appeals of the State of

New York, and also in his brief on the motion in the Appellate Division for leave to appeal to the Court of Appeals, after setting forth that this action was of great importance to both shippers and carriers, the statement made was that

> "This is especially true with reference to the present form of express receipts and bills of lading, which provide that suits for *loss or damage may be brought within two years after the carrier has declined the claim.*"

We do not know whether or not the Interstate Commerce Commission requires carriers to adopt the provision specified by the petitioner, but if it does, it is plainly in conflict with the amendment to the law as above set forth. This would not be the first time that it has misconstrued the Cummins Amendment, as will appear by the decision of this Court in *McCaull-Densmore* v. *Chi., Mil. & S. P. R. R. Co.*, 253 U. S., 97.

It is to be noted that the statement of the petitioner is that the Interstate Commerce Commission "has now required carriers" to adopt the provision it sets forth, not that the uniform express receipt contains any such provision. The fact is that the uniform express receipt now in use by the express company in the City of New York contains no reference whatever to the provision incorporated in 1920 in the Cummins Amendment to the Interstate Commerce Law that the period for institution of suits shall be "computed from the day when notice in writing is given by the carrier to the claimant" that the carrier has disallowed his claim in whole or in part. A reading of the amendment of 1920 shows very clearly that it is only as to cases where the law requires a claim to be filed

that the time for bringing suit has been extended until two years "after the carrier has disallowed the claim," namely, to what the Appellate Division of the State of New York in the case of *Bell* v. *New York Central Railroad Co., supra,* designated for brevity "non-transit cases," whereas, a claim for delay is what has been designated a "transit claim."

The petitioner states in his brief (p. 28):

> "On perusing the discussions in the House of Representatives and the Senate attendant upon the adoption of the First Cummins Amendment (Congressional Record, Volume 51, pp. 9616 to 9626, 9777 to 9783, Vol. 52, pp. 5446 to 5451) one is immediately struck with the fact that the illustrative cases used are confined practically entirely to shipments of live stock and that the hardships of the shippers which it was claimed the amendment would remedy were the hardships of live stock shippers."

It may be true as stated by the petitioner that in the discussions in Congress upon the adoption of the First Cummins Amendment, that the illustrative cases used were principally confined to shipments of live stock, nevertheless, such a perusal will show that these illustrative cases were used exclusively with reference to the practice of carriers in regard to released values, and that the only statement in those discussions having a reference to the present question was made in the House of Representatives and was to the effect that the proposed amendment here under consideration "abolished notice for loss, damage and liability except for theft."

The petitioner also states (p. 31):

> "The requirement that a notice of claim be filed within not less than four months from the time of delivery is perfectly reasonable. It is as reasonable in the case of a claim for delay as it is in the case of a claim for loss or damage. No argument can be advanced why a carrier should not be allowed to make such a requirement or why it should be expressly prohibited by statute."

In reply to this statement, we beg to quote from a decision of the Appellate Division of the Supreme Court of the State of New York in *Johnson* v. *M., K. & T. R. R. Co.*, 107 N. Y. App. Div., 375, where the Court, in an opinion by Mr. Justice Nathan Miller, said:

> "* * * the reason for requiring prompt notice of loss or damage to the property itself is apparent, for in such case it is obvious that prompt notice is required in order to enable the defendant to investigate the extent of the injury and the facts relative thereto, but in the case of a claim for damage to the shipper resulting from loss of market occasioned by delay, the carrier does not need to be promptly notified in order to ascertain the facts. The market quotations are preserved and can be ascertained at any time, and records must be kept by the different lines over which the property is transported, so that it should be possible at any time to ascertain the time of receipt by any given carrier and the delivery by it to the next succeeding carrier."

POINT II.

Upon showing an unreasonable delay, the burden is on the carrier to show a legal excuse if he has one, and in the absence of such excuse, the plaintiff is entitled to recover.

The petitioner says in his brief (p. 14):

> "The plaintiff claims that the provision of the First Cummins Amendment, passed March 4, 1915, made it unlawful for a common carrier to require the filing of written claims for delay. To this contention the defendant replies that the First Cummins Amendment, at most, prohibits the carriers requiring the filing of written claims in cases of negligent delay, that the burden of proof is on the shipper to prove such negligence, and this is not satisfied by the mere proof of the fact of delay beyond a reasonable time for delivery."

In the present case, the courts of the State of New York held that the plaintiff had established a sufficient *prima facie* case of unreasonable delay in the transportation of the car of eggs, as alleged in the complaint, and as the defendant offered no excuse for such delay, the plaintiff was clearly entitled to recover.

Ward v. *N. Y. C. R. R.*, 47 N. Y., 29;
Tierney v. *N. Y. C. & H. R. R. R.*, 76 N. Y., 305;
10 *Corpus Juris*, p. 301; and cases cited.

If there is any excuse for an unreasonable delay, such excuse is a matter wholly within the knowledge of the carrier, and it is incumbent upon the carrier to at least prove, if not to allege, such excuse. The Cummins Amendment does not change this common law requirement.

POINT III.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LAMAR HARDY,
Attorney for Respondent.

LOUIS C. WHITE,
Of Counsel.